judgment had this matter of interest been in my mind. After a lengthy trial, in the course of which both sides asked me to confine my decision to the issue of liability, and having written a long judgment which occasioned to me no small difficulty, my mind was on the issue of liability rather than upon any figures. But had I thought the matter through further, as I should have done, I am in no doubt whatever ... that I would have made an award of interest.

Taking the cue from Pickering J. I have to state that in the instant case, my mind was primarily drawn to the lengthy arguments and submissions of Counsel for the parties concerned which had concentrated essentially on matters other than on interest. Not unnaturally therefore my judgment was confined to the issues canvassed before me. Nevertheless, had the matter of interest been raised by Dr. Chew at the time I delivered judgment, I would have granted it. In the circumstances and having regard to O. 42 r. 12, I will allow this application and order that the judgment dated 15 May 1993 be amended to include an award of interest on the judgment sum at the rate of 8% per annum from date of judgment until it is satisfied. There will be no order as to cost on this application.

YAP KOK HENG (T/A EHSAN ENTERPRISE)

v.

INTERNATIONAL AUTO ENTERPRISE SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J.
[CIVIL APPEAL NO. R2-12-105-92]
19 OCTOBER 1993

CONTRACT: Forfeiture of deposit on non-completion of sale - Whether money paid was in fact a deposit - Whether contract between the parties provided for forfeiture.

The plaintiff entered into a contract for the purchase of a motor lorry from the defendant and paid a sum of RM4,000 in pursuance of the contract. The plaintiff failed to pay the balance of the purchase price despite being issued a notice by the defendant and the defendant forfeited the amount paid and sold the lorry to a third party.

The plaintiff sued for the return of the sum paid contending that the defendant had no right under the contract to forfeit the sum of RM4,000. The plaintiff further contended that time was not made of the essence and that in the event of delay the defendant was only entitled to storage charges. The plaintiff's claim was dismissed by the Sessions Court and the plaintiff appealed further.

Held:

[1] The fact that the payment of a sum of money in a purchase agreement is not expressed 'as a deposit and part payment of purchase money' does not for that reason alone render the payment not a true deposit or earnest money. The intention of the parties with regard to the payment as earnest money may be gathered by examining the agreement as a whole.

[2] It is clear that it was the intention of both the plaintiff and the defendant that the sum of RM4,000 was to be a deposit and part payment towards the purchase price. It was a true deposit or earnest money.

[3] Section 47 of the Contracts Act 1950 provides that when no time for performance of a promise is specified, the engagement must be performed within a reasonable time. The 7 days notice issued by the defendant to the plaintiff to complete the sale was a reasonable time for the plaintiff to perform his promise in the circumstances of the case.

[4] Conditions 2 & 4 of the contract should be read together. The word 'cancellation' in condition 4 was also used to include 'repudiation' and must mean putting an end to the contract. The defendant had chosen to put the contract to an end because of the plaintiff's refusal to perform and the defendant was entitled to forfeit the deposit under condition 4 of the contract.

[Appeal dismissed with costs].

Cases referred to:
Sun Properties Sdn. Bhd. & Ors. v. Happy Shopping Plaza Sdn. Bhd. [1987] CLJ 423/[1987] 1 MLJ 319 ***(refd)***
Linggi Plantations Ltd. v. Jagatheesan [1971] 1 MLJ 89 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 47

For the appellant - Goh Jenn Huei; M/s. Karpal Singh & Co.
For the respondent - Leong Ooi Seong; M/s. Rashid & Lee

[Ed. Note: The plaintiff has appealed to the Supreme Court *vide* Civil Appeal No. 02-411-93].

JUDGMENT

Wan Adnan bin Ismail J:
The plaintiff's claim against the defendant was for the refund of the sum of RM4,000 paid by him to the defendant as a deposit for the purchase of a Mercedes Benz motor lorry evidenced by the Order dated 27 July 1989 (the Contract). The claim also included a claim for damages for breach of contract.

The relevant conditions of the Contract are:

> 2. The date given for delivery whether in writing or otherwise is approximately only. However delivery must be taken within seven days of the issue of the Vehicle Invoice or written advice of arrival, otherwise the Buyer/Hirer will become liable for storage charges. The Company shall have the right to demand cash before delivery.
>
> 4. Booking fees, deposits or down payments in cash or in other forms whatsoever made to the Company are not refundable in the event of cancellation.

The Contract did not state the delivery date. The space meant for it was left blank. From the evidence at the trial it was clear that the motor lorry had to be re-conditioned before delivery and that the defendant had told the plaintiff that the vehicle would be ready for delivery at the end of October 1989. When the lorry was ready for delivery the defendant had telephoned the plaintiff three or four times to collect the lorry and to pay the balance of the purchase price. The plaintiff failed to do so. Then by notice dated 4 November 1989 (the notice) the defendant wrote to the plaintiff:

> Please accept this notification that the abovenamed vehicle ordered by you on 27 July 1989 is ready for delivery now and the balance of the purchase price of the goods is overdue for payment.
>
> Kindly call at our office any time within 7 days from the date of this letter; that is on or before 11 November 1989 to settle the outstanding balance.
>
> The deposit of RM4,000 paid for the above vehicle will be forfeited and the vehicle will be disposed off without further notice if payment is still not received by us on the above-stated date.

The notice was received by the plaintiff but since he did not comply with the requirement of the notice the defendant sold the lorry to a third party on 16 November 1989 and forfeited the deposit of RM4,000.

The plaintiff's claim was dismissed by the learned Sessions Court Judge. His appeal was dismissed by me.

Before me it was contended by the learned Counsel for the appellant/plaintiff that the defendant/respondent had no right under the Contract to forfeit the sum of RM4,000. He said that the deposit was not a true deposit. The deposit was not mentioned in the Contract. It was only agreed orally. He also said that under the Contract time was not made of the essence. Further he said that under Condition 2 of the Contract the plaintiff was only liable to pay for storage charges. There was no right to forfeit the deposit by the defendant. And under Condition 4 he said that deposit could be forfeited only "in the event of cancellation".

In *Sun Properties Sdn. Bhd. & Ors. v. Happy Shopping Plaza Sdn. Bhd.* [1972] 1 MLJ 89, Hashim Yeop A. Sani SCJ (as he then was) in delivering the judgment of the Supreme Court said:

> The crux of the matter here is whether the RM1,000,000 is a true deposit. If it is a true

> deposit or earnest money (the two terms being interchangeable) then the sum is irrecoverable by the respondent and it can lawfully be forfeited by the appellants ....
>
> The expression "as a deposit and part payment of the purchase money" always relates to the two alternatives that in the event of the purchaser making default the money is to be forfeited and that in the event of the purchase being completed the sum is to be taken as part payment. A deposit is not merely a part payment but is also an "earnest" money to bind the bargain entered into and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract. The deposit therefore serves two purposes, that is, if the purchase is carried out it goes against the purchase money but the primary purpose for the deposit is to act as a guarantee that the purchaser means business.

It is true in this case the payment of the deposit of RM4,000 was not mentioned in the Contract. But the sum of RM4,000 was paid by the plaintiff and the defendant issued a receipt therefore "being payment of Deposit for M/B 1413" (Ex. P1A) and 'deposits' are stated in Condition 4 of the Contract to being not refundable. It is also true that it is not stated in the Contract that the payment of the said RM4,000 was "a deposit and part payment of the purchase money". In my opinion the fact that the payment of a sum of money in a purchase agreement is not expressed 'as a deposit and part payment of purchase money' does not for that reason only render the payment not being a true deposit or earnest money. The intention of the parties to regard the payment as an earnest money may be gathered by examining the agreement as a whole.

The purchase price of the lorry was RM58,000. The sum of RM4,000 paid by the plaintiff was less than 7% of the purchase price. In my view there is nothing unusual or extortionate (using the words of Lord Hailsham LC in *Linggi Plantations Ltd. v. Jagatheesan* [1971] 1 MLJ 89) in a 7% deposit on the contract for the sale of the lorry. It is not uncommon in contracts relating to purchase of lands or chattels that a deposit of 10% is required. Condition 4 of the Contract states that deposits are not refundable. In my judgment it is clear that it was the intention of both the plaintiff and the defendant that the sum of RM4,000 was to be a deposit and part payment towards the purchase price. It was a true deposit or earnest money.

a Section 47 of the Contracts Act 1950 provides that when no time for performance of a promise is specified, the engagement must be performed within a reasonable time. What is a reasonable time is a question of fact.

b It is not disputed that when the lorry was ready for delivery the plaintiff was requested through the phone three or four times by the defendant to complete the sale. Because of the plaintiff's failure to complete the sale as requested the defendant then issued the notice. The notice gave the plaintiff 7 days to complete the sale. In my view the plaintiff had been given a reason-
c able time to perform his promise in the circumstances of the case. Before the notice was given he was already contacted three or four times by phone. The defendant was acting pursuant to Condition 2 when he issued the notice.

d It is also my view that Conditions 2 and 4 of the Contract should be read together. The defendant could, if he wanted to, allow the plaintiff further time under Condition 2 and claim storage charges. But he had chosen to put the Contract to an end because of the plaintiff's refusal to perform. He had repudiated the Con-
e tract and under Condition 4 he was entitled to forfeit the deposit. The word 'cancellation' in Condition 4 must mean putting an end to the Contract. 'Repudiation' is an absolute refusal to perform a Contract. 'Cancellation' was used to also include 'repudiation'.

f For the above reasons I dismissed the appeal with costs.

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